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No. 03-1635

In the Supreme Court of the United States

CURTIS SHAFFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Under 28 U.S.C. 2501, a civil action filed in the Court of Federal Claims must be commenced within six years of the date on which the claim "first accrues." The question presented is whether a former service member's claims in a lawsuit challenging his discharge and seeking monetary relief under the Tucker Act, 28 U.S.C. 1491(a)(1), first accrued when he was discharged or when the military administrative board denied his application for review of the discharge.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1) is not published in the *Federal Reporter* but is reprinted at 89 Fed. Appx. 265. The opinion of the United States Court of Federal Claims (Pet. App. 2-11) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2004. The petition for a writ of certiorari was filed on June 2, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was a sergeant in the Army Reserves. He was also employed in a civilian position with the

Army, which was conditioned upon his maintaining membership in the Reserves. In December 1993, petitioner received a general discharge from the Reserves under honorable conditions. In April 1994, he was terminated from his civilian job. Pet. App. 3.

2. Petitioner sought review of his discharge by the Army Discharge and Review Board (ADRB) and the Army Board for Correction of Military Records (Army Correction Board or Board). Before either board had ruled, petitioner filed a complaint in the United States District Court for the Western District of Tennessee, challenging his military discharge and his civilian-job termination. Petitioner alleged that both actions violated due process and Army regulations and were racially discriminatory, in violation of 42 U.S.C. 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16. In March 1997, the district court dismissed petitioner's suit without prejudice, holding that (a) military personnel cannot sue their superior officers for damages; (b) Section 1981 actions cannot be maintained against the government; (c) Title VII provides the exclusive remedy for federal civilian employees' claims of racial discrimination; and (d) petitioner failed to exhaust either civilian or military administrative remedies. In June 1997, the ADRB denied petitioner relief, and in March 1998, the Army Correction Board did the same. Pet. App. 3, 16-22; Pet. 2.

In May 1998, the Sixth Circuit affirmed the decision of the district court. The court of appeals noted that petitioner had abandoned his challenge to the termination of his civilian employment and his due process challenge to his military discharge, and held that petitioner's non-constitutional challenge to his military discharge was not justiciable. Pet. App. 12-15; Pet. 3.

3. In October 2000, more than two years after the Sixth Circuit affirmed the dismissal of his suit and nearly seven years after his discharge from the Reserves, petitioner filed suit in the Court of Federal Claims. Pet. App. 3. He alleged (a) that his military discharge violated the Military Whistleblower Protection Act, 10 U.S.C. 1034, and the Administrative Procedure Act (APA), 5 U.S.C. 702; (b) that the Army Correction Board improperly failed to correct his records; and (c) that the ADRB improperly failed to upgrade his discharge. Pet. App. 3-4.

The court dismissed the suit, Pet. App. 2-11, finding it untimely under 28 U.S.C. 2501, which provides that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." Relying on the Federal Circuit's decision in *Hurick* v. *Lehman*, 782 F.2d 984 (1986), the court concluded that petitioner's wrongful-discharge claim accrued at the time of his discharge in 1993. Pet. App. 4-6. The court also rejected petitioner's contention that the statute of limitations should have been equitably tolled while he pursued his administrative remedies. *Id.* at 6-7. As an alternative basis for its decision, the court held that petitioner had failed to state a claim for relief, because he had not identified a "money-mandating" statute to support his claim under the Tucker Act, 28 U.S.C. 1491(a)(1), as required by *United States* v. *Testan*, 424 U.S. 392 (1976). Pet. App. 7-11.

4. Petitioner filed an appeal to the Federal Circuit, which stayed the case pending its decision in *Martinez* v. *United States*, 333 F.3d 1295 (2003) (en banc), cert. denied, 124 S. Ct. 1404 (2004). Pet. 3.

In June 2003, the Federal Circuit decided *Martinez*, which adhered to that court's earlier decision in *Hurick* and held that a claim under the Tucker Act for monetary losses sustained from a military discharge accrues on the date of discharge and is barred if suit is not brought within six years of that date. 333 F.3d at 1302-1310. Holding that resort to the Army Correction Board was not mandatory, *Martinez* rejected the contention that the claim did not accrue until the date of the Board's decision, and concluded that the Board's decision did not give rise to a separate cause of action with a new limitations period. *Id.* at 1302-1315. *Martinez* also held that the doctrine of equitable tolling did not apply in that case. *Id.* at 1315-1319.

After *Martinez* was decided, the Federal Circuit affirmed the dismissal of petitioner's suit without opinion. Pet. App. 1.

ARGUMENT

Martinez considered and rejected the principal contention raised by petitioner, and is controlling on the question whether his suit is time-barred under 28 U.S.C. 2501. This Court denied certiorari in *Martinez* only seven months ago, see *Martinez* v. *United States*, 124 S. Ct. 1404 (2004) (No. 03-418), and there is no reason for the Court to review the non-precedential order in this case.[1]

1. Like the petitioner in *Martinez*, petitioner here contends (Pet. 3-5) that the Federal Circuit's decision in *Martinez* is incorrect and conflicts with decisions of other courts of appeals holding that exhaustion of a correction-board remedy is mandatory and that a

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[1] We are forwarding to counsel for petitioner a copy of our brief in opposition in *Martinez*.

board's decision is reviewable under the APA even though the limitations period for a challenge to the military's underlying decision has expired.[2] As our brief in opposition in *Martinez* explained (at 9-10), that contention is without merit. The Federal Circuit in *Martinez* correctly distinguished the APA cases on the ground that they did not involve a claim for money damages. See 333 F.3d at 1313. Indeed, the court in *Martinez* observed that this distinction was recognized by "the very cases on which [the petitioner] rel[ied]." *Ibid.* See *Blassingame* v. *Secretary of Navy*, 811 F.2d 65, 72 (2d Cir. 1987); *Smith* v. *Marsh*, 787 F.2d 510, 511-512 (10th Cir. 1986); *Dougherty* v. *United States Navy Bd. for Correction of Naval Records*, 784 F.2d 499, 501-502 & n.10 (3d Cir. 1986); *Geyen* v. *Marsh*, 775 F.2d 1303, 1308-1309 (5th Cir. 1985).

Also like the petitioner in *Martinez*, petitioner here contends (Pet. 10-11) that the statute governing correction boards, 10 U.S.C. 1552, is a "money-mandating" statute that supports Tucker Act jurisdiction. See *United States* v. *Testan*, 424 U.S. at 398-400. As the court explained in *Martinez*, however, the only pay that a discharged service member can claim is the military pay he would have received but for the challenged discharge. See 333 F.3d at 1303, 1311, 1314-1315. It is thus the military-pay statute, not Section 1552, that is the money-mandating statute.

For reservists like petitioner, moreover, the applicable pay statute is 37 U.S.C. 206—not, as petitioner contends (Pet. 11-12), 37 U.S.C. 204, which applies only to full-time active-duty soldiers, see *Holley* v. *United*

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[2] The same contention is raised in the certiorari petition in *Smalls* v. *United States*, No. 03-10695 (filed May 25, 2004), which is also pending before the Court.

States, 124 F.3d 1462, 1465 (Fed. Cir. 1997). And the Court of Federal Claims correctly held (Pet. App. 9-10) that Section 206 provides pay for reservists only for drills actually attended or active duty actually performed; it does not support petitioner's claim for payment for services that he did not render because of his discharge. See *Palmer* v. *United States*, 168 F.3d 1310, 1314 (Fed. Cir. 1999). Petitioner would therefore not be entitled to relief even if his suit were timely. See Pet. App. 7-11.

2. The contentions raised by petitioner that were not addressed in our brief in opposition in *Martinez* are equally without merit, and likewise do not warrant further review.

a. Relying on the district court's dismissal of his earlier suit for failure to exhaust administrative remedies (Pet. App. 16-22), petitioner contends (Pet. 7-8) that the law-of-the-case doctrine required the Federal Circuit to hold that exhaustion of his Army Correction Board remedy was mandatory. Law of the case, however, applies only to decisions of the same court or of coor dinate courts; it does not require a court of appeals to follow a district court's decision on a question of law. See *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). That doctrine, moreover, "posits that when a court decides upon a rule of law, th[e] decision should continue to govern the *same issues* in subsequent stages in the *same case*." *Id.* at 816 (quoting *Arizona* v. *California*, 460 U.S. 605, 618 (1983)) (emphasis added). Here, petitioner's complaint in the Court of Federal Claims initiated a different lawsuit that alleged different facts and sought different relief under different statutes. Compare Pet. App. 13 (earlier case) (due process and 42 U.S.C. 1981) with Pet. App. 8 (this case) (Military Whistleblower Protection

Act (10 U.S.C. 1034), APA (5 U.S.C. 702), and 10 U.S.C. 1552 and 1553).

b. Petitioner also contends (Pet. 9-10) that the statute of limitations should have been equitably tolled, because he "followed the instruction" (Pet. 9) of the District Court for the Western District of Tennessee by exhausting his Army Correction Board remedy. Applying settled legal principles to the facts of this case, the Court of Federal Claims rejected that contention (Pet. App. 6-7), and the Federal Circuit correctly affirmed its decision. *Martinez* declined to decide whether the limitation period in 28 U.S.C. 2501 could ever be subject to equitable tolling, because the plaintiff had not made a sufficient showing to warrant tolling even if it were available. See 333 F.3d at 1315-1319. As the court observed, this "narrow doctrine" requires "a compelling justification for delay, such as 'where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.'" *Id.* at 1318 (quoting *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990)). Petitioner cannot provide any justification for equitable tolling, much less a compelling one, particularly since the Army Correction Board denied his application nearly two years before the expiration of the six-year limitation period. See Pet. App. 3.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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